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No. 88-2012

In the

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH L. LAMONTAGNE,

Petitioner,

against

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, United Wire Metal and Machine Pension Fund[1] and the Board of Trustees of the United Wire Metal and Machine Pension Fund, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Joseph L. Lamontagne, seeking review of the order of the United States Court of Appeals for the Second Circuit entered in this case on February 27, 1989.

Counter-Statement of the Case

This section corrects the inaccuracies and omissions in the brief statement of the case in the petition for certiorari. Respondents respectfully submit that a thorough understanding of the facts, including the relevant provisions of the applicable Pension Plan and the petitioner's employment history, is essential to enable this Court to make a reasoned determination whether to grant the petition and review this matter.

[1] The United Wire, Metal and Machine Pension Fund was incorrectly sued as the "Pension Plan of the United Wire, Metal and Machine Pension Fund."

The Pension Plan

The petitioner's eligibility for a pension is governed by the terms of the Pension Plan of the United Wire, Metal and Machine Pension Fund (the "Pension Plan"), as amended through February 2, 1970. Article I, Section 7 of the Pension Plan defines "Covered Employment" as employment in which the employee earns credit towards a pension provided by the United Wire, Metal and Machine Pension Fund (the "Pension Fund").

The Pension Plan established four categories of pensions: (1) a Normal Pension, (2) a Reduced Pension, (3) an Early Retirement Pension and (4) a Disability Pension. In order to qualify for a Disability Pension, an employee must become "totally and permanently disabled" after having accrued at least 15 years of pension credit. "Total and permanent disability" is defined by Article II, Section 10 of the Pension Plan, as follows:

> An Employee shall be deemed to be totally and permanently disabled if on the basis of medical evidence satisfactory to the Trustees, he is found to be totally and permanently unable as a result of bodily injury or disease to engage in Covered Employment and provided further that he does not earn more than $1,200 a year in any other employment or gainful pursuit whatsoever. The Trustees shall be the sole and final judges of a total and permanent disability and of entitlement to a Disability Pension.

In order to qualify for a Normal, Reduced or Early Retirement Pension, an employee must accumulate a given number of years of pension credit and must retire *after* he has attained a minimum age. The minimum retirement age for the Normal and Reduced Pensions is 65. An employee must retire after attaining age 55 in order to be eligible for an Early Retirement Pension. Article II, Section 13(a) of the Pension Plan provides, "Retirement shall mean complete withdrawal from any work in Covered Employment".

Break In Service Rule

Article III, Section 5(b) of the Pension Plan defines a "break in employment"[2] as follows:

> It shall be considered a break in employment and a person's previous Pension Credits shall be cancelled if after his Contribution Date the Employee fails to work at least 800 hours in Covered Employment within any period of two consecutive calendar years or fails to have paid on his behalf the following amounts of contributions as applicable within any period of two consecutive calendar years . . . .

Article III, Section 5(c) of the Pension Plan authorizes the Board of Trustees to allow an additional "grace period", not counted towards a break in employment, for a period of up to 8 quarters during which an employee is absent and fails " . . . to earn Pension Credit because of total disability for work in Covered Employment . . . ". Article III, Section 5(c) provides, as follows:

> C. Exception on Account of Disability
>
> A period of absence from Covered Employment to a maximum of 8 quarters, during which an Employee failed to earn Pension Credit because of total disability for work in Covered Employment shall be considered a grace period and, therefore, shall not be counted toward a break in Covered Employment. For purposes of this provision an Employee shall be deemed totally disabled only if on the basis of medical evidence satisfactory to the Trustees he has been found to be totally unable as a result of bodily injury or disease to engage in Covered Employment. The Trustees shall be the sole and final judges of total disability within the meaning of this Section and entitlement to the grace period provided herein.

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[2] A "break in employment" is also known as a "break in service".

> For periods after January 1, 1961, an Employee shall make written application to the Trustees for recognition of a period of disability as a grace period and no such recognition shall be granted for a period which is more than 12 months before the time of application, except if the Trustees find that extenuating circumstances prevented earlier application.

According to Article III, Section 5(a) of the Pension Plan, the purpose of the break in employment provision is " . . . to provide benefits to Employees who remained in Covered Employment more or less continuously over a period of years and up to the time when they retire on a pension."

The Petitioner's Employment History and Application for Pension Benefits

The petitioner was born on January 17, 1920. He worked in covered employment as a machinist for Detecto Scales, Inc. from 1954 until September 7, 1971, when he aggravated a back injury. He received Workmen's Compensation until April 8, 1972 (A-17).[3]

The petitioner worked as a "spot welder" for another manufacturing concern from 1973 through 1977. However, the Pension Fund received no contributions on the petitioner's behalf during this period, as he was not engaged in "covered employment" for the purposes of the Pension Plan. After he left this manufacturing job in January, 1977, the petitioner collected unemployment insurance.

In April, 1978, the petitioner applied to the Pension Fund for a Disability Pension. In a letter dated November 14, 1978, the Plan Administrator informed the petitioner that the Board of Trustees of the Pension Fund had denied his " . . . application for pension benefits for failure to meet the requirements for either a Disability or Partial Pension from the Fund." Based

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[3] Page references preceded by "A" refer to the appendix to the petition for certiorari. The facts in this paragraph are taken from the Memorandum, Opinion and Order of Hon. Mary Johnson Lowe, which is reprinted in the appendix to the petition for certiorari.

upon earnings records from Detecto Scales and the Social Security Administration, the Trustees found that the petitioner left covered employment with Detecto in 1972, when he was approximately 52 years of age,[4] several years prior to attaining the minimum retirement age of 55 in order to qualify for an Early Retirement Pension. The November, 1978 letter informed the petitioner that he had incurred a break in service of approximately 5 years since he left Detecto Scales, as he failed to work at least 800 hours in covered employment within any period of two consecutive calendar years during that time. In accordance with Article III, Section 5(b) of the Pension Plan, the break in service incurred by the petitioner after he left covered employment with Detecto Scales permanently resulted in the cancellation of his accrued pension credits.[5]

The November, 1978 letter concluded by informing the petitioner that he had a right to appeal the denial of his application to the full Board of Trustees within sixty days. The letter explained to the petitioner how to perfect his appeal and inspect the pertinent documents. The petitioner never pursued this internal appeal procedure.

On or about November 7, 1986, approximately 8 1/2 years after his first application, the petitioner submitted another application, purportedly for a Reduced Pension which requires

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[4] The earnings records from the Social Security Administration, which the Trustees obtained, showed that the petitioner earned a small amount of money from Detecto Scales in 1972. However, it is undisputed that the petitioner left Detecto Scales permanently in September, 1971 and this comports with the findings of both the District Court (A-17) and the Court of Appeals (A-3).

[5] A copy of the applicable Pension Plan was enclosed in the November, 1978 letter. In a further effort to determine whether the petitioner was eligible for pension benefits, the Trustees inquired whether the union, which represented him in the manufacturing job he held from 1973 until 1977, subscribed to the National Reciprocal Agreement for Teamster Pension Funds. A Partial Pension is available if another pension fund subscribes to the National Reciprocal Agreement, which allows pension credits from two or more different funds to be combined to afford an employee a partial pension from each fund. Unfortunately, this union did not honor the reciprocity agreement and, thus, the petitioner was ineligible for a Partial Pension.

retirement after the employee attains age 65. By letter dated December 3, 1986, the counsel to the Pension Fund informed the petitioner's attorney that the Board of Trustees had declined to reconsider their November, 1978 determination that the petitioner had incurred a break in service in 1972, prior to the effective date of ERISA. The letter point out, "Since a break-in-service occurred in 1972, the letter sent out in November, 1978 was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

Prior Proceedings

By summons and verified complaint dated January 6, 1987, over fifteen years after he left covered employment permanently, the petitioner commenced this action seeking to challenge the Board of Trustees' denial of his application for pension benefits. The complaint alleged: (1) that the Board of Trustees violated their fiduciary duties under Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1104(a); (2) that the denial of pension benefits to him violated the minimum vesting standards in ERISA Section 203, 29 U.S.C. Section 1053, and (3) that the Plan's break in employment provision constituted a "structural defect" violative of Section 302(c)(5) of the Labor-Management Relations Act (the "Taft-Hartley Act"), 29 U.S.C. Section 186(c)(5).

Respondents moved (1) to dismiss the complaint for lack of federal subject matter jurisdiction under ERISA and (2) for summary judgment.

The District Court granted the respondents' motion and dismissed the complaint. Hon. Mary Johnson Lowe concluded that there was no federal subject matter jurisdiction over the petitioner's claims brought pursuant to the fiduciary standards and minimum vesting provisions of ERISA. Judge Lowe also concluded that the petitioner's claims under the Taft-Hartley Act were time-barred pursuant to a six-year statute of limitations, which began to run when his application for pension benefits was denied in November, 1978 (A-12-31). The United States Court of Appeals affirmed the conclusions of the District Court in an opinion (A-1-11); reported as *Lamontagne v. Pension*

Plan of the United Wire, Metal and Machine Pension Fund, 869 F.2d 153 (2nd Cir. 1989).

Summary of Argument

The sole issue presented for review by this Court in the petition for a writ of certiorari is whether the fiduciary standards in ERISA, which became effective on January 1, 1975, apply to all denials of pension benefits occurring on or after that date, regardless of whether a denial was based upon the provisions of an employee benefit plan adopted prior to ERISA's effective date, as was the case at bar. This issue deals with the construction of Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1).

Respondents respectfully submit that the issue presented for review in the petition for certiorari is not dispositive of this case. The petitioner's claims brought pursuant to ERISA challenging the determination by the Trustees denying his application for pension benefits warrant dismissal for several major reasons. Firstly, the petitioner's ERISA claims are barred by the statute of limitations set forth in ERISA Section 413(a), 29 U.S.C. Section 1113(a), applicable to actions alleging breach of fiduciary duty, and by the state statute of limitations applicable to actions to recover benefits due under the terms of the plan, brought pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B). The petitioner's causes of action, pursuant to both ERISA's fiduciary standards provisions and ERISA Section 502(a)(1)(B), accrued on or about November 14, 1978, the date of the letter from the Plan Administrator notifying the petitioner of the Trustees' determination to deny his application for pension benefits, as he had incurred a break in service when he left covered employment permanently in 1971. Secondly, the petitioner is clearly ineligible for a pension under the terms of the applicable pre-ERISA Pension Plan, as his accrued pension credits were cancelled pursuant to the break in service provision.

The petitioner has failed to request this Court to review any of the above issues, which are dispositive of his ERISA claims. Accordingly, a determination by this Court on the sole issue presented for review would not serve the interests of judicial

economy, as the petitioner's ERISA claims warrant dismissal on several other grounds.

The Court of Appeals for the Second Circuit correctly construed and applied the "act or omission" exception to the preemption provision in Section 514(b)(1) of ERISA under the circumstances at bar. The relevant "act", for the purposes of ERISA's Section 514(b)(1), was the Pension Fund's adoption of the break in employment policy prior to the January 1, 1975 effective date of the fiduciary standards provisions of ERISA. The Trustees' denial of the petitioner's pension application was the inexorable consequence of this pre-ERISA break in employment policy. The construction of Section 514(b)(1) of ERISA by the Second Circuit, which is in accord with decisions from the Courts of Appeals for the First, Seventh, Eighth and Ninth Circuits, comports with the intent of Congress to apply the new standards for employee benefit plans set forth in ERISA prospectively only and to prevent the pre-ERISA conduct of plan fiduciaries from being judged retroactively under ERISA's standards. Additionally, in view of the petitioner's ineligibility for benefits under the terms of the Pension Plan, review by this Court of the issue raised in the petition for certiorari would not alter the substantive result reached by the Court of Appeals, the dismissal of the petitioner's complaint.

ARGUMENT

POINT I

This case is not appropriate for review by this Court, as the sole issue raised in the petition for certiorari is not dispositive and the petitioner has failed to seek review of the major dispositive issues.

The sole issue presented for review by this Court in the petition for a writ of certiorari is whether the fiduciary standards in ERISA, which became effective on January 1, 1975, apply to all denials of pension benefits occurring on or after that date, regardless of whether a denial was based upon the provisions of an employee benefit plan adopted prior to ERISA's effective date, as was the case at bar. This issue deals with the construc-

tion of Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1), which provides that ERISA's preemption of state law " . . . shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." The United States Court of Appeals for the Second Circuit affirmed the dismissal of the petitioner's claims brought pursuant to ERISA's fiduciary standards provisions for lack of federal subject matter jurisdiction, pursuant to ERISA Section 514(b)(1), after concluding, as follows:

> Given Lamontagne's employment history, the 1978 denial of his pension application was merely a consequence of the Fund's adoption of the break in employment policy. The relevant act for Section 1144(b)(1) purposes—the Fund's adoption of the break in employment policy—occurred before 1975. Therefore, the fiduciary standards section of ERISA does not apply to Lamontagne's claim and the ruling by the district court in dismissing it was correct. (A-6)

For the reasons discussed in further detail in Point III, *infra* of this brief, the Court of Appeals correctly construed and applied the "act or omission" provision in ERISA Section 514(b)(1) in the context of this case. There is, however, an additional compelling reason for this Court to deny the petition for certiorari at bar. Even assuming *arguendo* that this Court rejects the conclusion of the Court of Appeals on the question presented for review and concludes that federal subject matter jurisdiction exists over the petitioner's claim pursuant to the fiduciary standards set forth in ERISA Section 404(a), 29 U.S.C. Section 1104(a), said claim lacks merit for several reasons. The major grounds for rejecting the petitioner's ERISA challenge to the determination by the Trustees denying his application for pension benefits, which are discussed in further detail in Point II, *infra* of this brief, are as follows:

> (1) The petitioner's ERISA claims are barred by the statute of limitations set forth in ERISA Section 413(a), 29 U.S.C. 1113(a), applicable to actions alleging breach of fiduciary duty, and by the state statute of limitations applicable to an action to recover

benefits due under the terms of the plan, brought pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B);

(2) The petitioner's causes of action, pursuant to both ERISA's fiduciary standards provisions and ERISA Section 502(a)(1)(B), accrued on or about November 14, 1978, the date of the letter from the Plan Administrator notifying the petitioner of the Trustees' determination to deny his application for pension benefits, as he had incurred a break in service when he left covered employment permanently in 1971;

(3) The petitioner is clearly ineligible for a pension under the terms of the applicable pre-ERISA Pension Plan, as his accrued pension credits were cancelled pursuant to the break in service provision in Article III, Section 5 of the plan.

The petitioner has failed to request this Court to review any of the above issues in the petition for certiorari. Accordingly, these issues, which are dispositive of the petitioner's ERISA claims, are not properly before this Court. In accordance with Rule 21.1(a) of the Rules of this Court, "Only the questions set forth in the petition or fairly included therein will be considered by the Court." This Court has repeatedly declined to address issues not raised in the petition for certiorari or in a cross-petition for certiorari. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-59, 107 S. Ct. 1114, 1116, 94 L.Ed.2d 293, 297-98 (1987), *reh'g denied*, 481 U.S. 1033, 107 S. Ct. 1966, 95 L.Ed.2d 537 (1987); *United States v. Leon*, 468 U.S. 897, 905, 104 S. Ct. 3405, 3411, 82 L.Ed.2d 677, 686-87 (1984); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12, 103 S. Ct. 1952, 1958 n. 12, 76 L.Ed. 2d 66, 75-76 n.12 (1983); *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18, 102 S. Ct. 1510, 1518 n.18, 71 L.Ed.2d 715, 724 n.18 (1982); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 397-98, 99 S. Ct. 1171, 1175-76, 59 L.Ed.2d 401, 407-408 (1979); *Procunier v. Navarette*, 434 U.S. 555, 559-560 nn. 5&6, 98 S. Ct. 855, 858-59 nn. 5&6, 55 L.Ed.2d 24, 29 nn. 5&6 (1978); *Stone v. Powell*, 428 U.S. 465, 481 n. 15, 96 S.Ct. 3037, 3046 n.15, 49 L. Ed.2d 1067, 1080 n.15 (1976); *Radzanower*

v. Touche Ross & Co., 426 U.S. 148, 151 n. 3, 96 S.Ct. 1989, 1992, n.3, 48 L.Ed.2d 540, 545 n.3 (1976).

There are no exceptional circumstances at bar which would justify a departure from this Court's stated policy of declining to address issues not set forth in the petition for certiorari. *See Heckler v. Campbell*, 461 U.S. at 468-69 n.12, 103 S.Ct. at 1958 n.12, 76 L.Ed.2d at 75-76 n.12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 398, 99 S. Ct. at 1175-76, 59 L.Ed.2d at 408; *Stone v. Powell*, 428 U.S. at 481 n.15, 96 S. Ct. at 3046 n.15, 49 L.Ed.2d at 1080 n.15. The issues omitted from the petition for certiorari are not jurisdictional in nature. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 398, 99 S. Ct. at 1175, 59 L.Ed.2d at 408. Nor are the issues concerning the statute of limitations and the petitioner's ineligibility for benefits under the terms of the applicable Pension Plan "fairly included" in the single issue raised in the petition for certiorari, the construction of the "act or omission" provision in ERISA Section 514(b)(1), 29 U.S.C. Section 1144(b)(1), within the meaning of Rule 21.1(a) of the Rules of this Court. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 814 n. 2, 105 S. Ct. 2427, 2431 n.2, 85 L.Ed.2d 791, 798 n.2 (1985), *reh'g denied*, 473 U.S. 925, 106 S.Ct. 16, 87 L.Ed.2d 695 (1985); *Vance v. Terrazas*, 444 U.S. 252, 258 n. 5, 100 S. Ct. 540, 544 n. 5, 62 L.Ed.2d 461, 468-69 n.5 (1980), *reh'g denied*, 445 U.S. 920, 100 S.Ct. 1285, 63 L.Ed.2d 606 (1980).

Accordingly, this Court should decline to grant the petition for certiorari, as the single issue set forth therein is not dispositive of this matter and this Court cannot address the major dispositive issues omitted from the petition.

POINT II

The petitioner's ERISA claims warrant dismissal, as they are time-barred and he is clearly ineligible for benefits from the Pension Fund.

Assuming *arguendo* that this Court determines that federal subject matter jurisdiction exists over the petitioner's ERISA claims, said claims lack merit for reasons not addressed in the

petition for certiorari. Therefore, a determination by this Court on the single issue presented in the petition will not serve the interests of judicial economy, as the petitioner's challenge to the denial of his application for pension benefits is flawed on other grounds which will be addressed in further detail below.

A. The Petitioner's ERISA Claims are Barred by the Appropriate Statutes of Limitations.

The Court of Appeals affirmed the determination of the District Court that the petitioner's claim brought pursuant to Section 302(e) of the Taft-Hartley Act, 29 U.S.C. Section 186(e), was time-barred by the applicable six-year statute of limitations. According to the Court of Appeals, the petitioner's cause of action accrued in November, 1978, when the Plan Administrator notified him in writing of Trustees' determination to deny his application for pension benefits (A-9-11). A similar result requires the dismissal of the petitioner's ERISA claims.

In the complaint, the petitioner alleges that, by denying his application for pension benefits, the Trustees breached their fiduciary duties pursuant to ERISA Section 404(a), 29 U.S.C. Section 1104(a).[6] The statute of limitations for breach of fiduciary duty claims is set forth in ERISA Section 413(a), 29 U.S.C. Section 1113(a). This section provides that no action alleging a breach of fiduciary duty pursuant to ERISA may be commenced

> . . . after the earlier of -
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation . . .

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[6] The petitioner's claim that the denial of his application for pension benefits violated the minimum vesting standards set forth in ERISA Section 203, 29 U.S.C. Section 1053 was properly rejected by the Court of Appeals and he has not requested review of this issue in the petition for certiorari.

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

In the instant case, the Court of Appeals correctly concluded that the petitioner's cause of action pursuant to the Taft-Hartley Act accrued in November, 1978. At that time, the Plan Administrator informed him in writing that he was ineligible for pension benefits, as his accrued pension credits had been cancelled, pursuant to the terms of Article III, Section 5 of the Pension Plan, when he incurred a break in service by withdrawing permanently from covered employment in 1971. The petitioner's cause of action for breach of fiduciary duty pursuant to ERISA, likewise, accrued in November, 1978. This is the earliest date on which the petitioner had "actual knowledge of the breach or violation" within the meaning of ERISA Section 413(a), in this case the Trustees' denial of his application for pension benefits on the ground that he had incurred a break in service. Accordingly, the statute of limitations for the petitioner's breach of fiduciary duty claim expired in November, 1981, three years after the letter of November, 1978. *See Rochester Radiology Associates, P.C. v. Aetna Life Insurance Co.*, 616 F.Supp. 985, 989 (W.D.N.Y. 1985); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. 1404, 1411-12 (D. Md. 1984). At the latest, the statute of limitations for the petitioner's breach of fiduciary duty claim expired in November, 1984, six years after the November, 1978 letter denying his application.

In addition to the allegations that the Trustees violated ERISA's fiduciary standards set forth in the complaint, the petitioner asserted before the District Court and the Court of Appeals that ERISA afforded him a federal cause of action for denial of benefits in violation of the terms of the applicable Pension Plan. ERISA contains no statute of limitations for actions to recover benefits brought pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1) (B). Accordingly, the federal courts have applied the most appropriate state statute of limitations, which has consistently been held to be the limitations period applicable to actions for breach of contract. *See Anderson v. John Morrell and Co.*, 830 F.2d 872, 877 (8th Cir 1987); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d

975, 981 (4th Cir. 1987); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. at 1413; *Morgan v. Laborers Pension Trust Fund for Northern California*, 433 F.Supp. 518, 526 (N.D. Calif. 1977). In the instant case, the six-year statute of limitations for breach of contract actions in New York, which the Court of Appeals applied to the petitioner's Taft-Hartley claim, would also govern his claim for benefits pursuant to ERISA Section 502(a)(1)(B). The finding by the Court of Appeals that the petitioner's Taft-Hartley claim accrued in November, 1978, when the Plan Administrator clearly apprised him of the Trustees' repudiation of his claim for benefits (A-9), applies with equal force to his cause of action pursuant to ERISA Section 502(a)(1)(B). Accordingly, the statute of limitations for said claim expired in November, 1984, over two years before the petitioner commenced the instant action.

The Court of Appeals correctly rejected the petitioner's argument that his belated request for reconsideration of the Trustees' rejection of his 1978 application in November, 1986, denominated as an application for a Reduced Pension, revived his cause of action challenging the earlier denial. The petitioner presented no new facts which would render him eligible for benefits under the terms of the applicable pre-ERISA Pension Plan. The petitioner does not dispute the finding by the Court of Appeals that he left covered employment permanently in September, 1971 (A-3). The November, 1978 letter properly informed the petitioner that he was ineligible for a Disability Pension, an Early Retirement Pension or a Partial Pension, as he had incurred a break in service, within the meaning of Article III, Section 5(b) of the Pension Plan, when he left covered employment permanently. According to Article III, Section 5(b) of the Pension Plan, an employee incurs a break in employment, resulting in the cancellation of his previously earned pension credits, when he fails to work at least 800 hours in covered employment or fails to have a certain amount of employer contributions paid on his behalf, during any period of two consecutive calendar years. The petitioner's accrued pension credits were cancelled pursuant to the above provision when he withdrew permanently from covered employment prior to attaining the minimum retirement age of 55 for an

Early Retirement Pension.[7] In his letter dated December 3, 1986, Sidney L. Meyer, Esq., the attorney for the Pension Fund, informed the petitioner that the Trustees had declined to reconsider his eligibility for benefits from the Pension Fund, as the November, 1978 conclusion that he had incurred a break in service when he withdrew permanently from covered employment " . . . was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

The result reached by the Trustees, which was upheld by both the District Court and the Court of Appeals, is not altered by the petitioner's assertion that his November, 1986 request for reconsideration by the Trustees included an application for a "grace period" pursuant to Article III, Section 5(c) of the Pension Plan. Firstly, the "grace period" could not have salvaged the pension credits which had been cancelled by the petitioner's break in service, as it is undisputed that he never returned to covered employment after September, 1971. Secondly, the earnings records from the Social Security Administration, which the Trustees reviewed prior to making their November, 1978 determination, indicated that the petitioner earned more than $1200 in the calendar years of 1973, 1974, 1975 and 1976. Accordingly, the petitioner was not totally and permanently disabled within the meaning of Article II, Section 10 of the Pension Plan during the calendar years immediately after he left covered employment, which would purportedly be included in the "grace period" he was requesting. Lastly, although the Plan allows the Trustees to extend the 12 month deadline for applying for the "grace period" if they " . . . find that extenuating circumstances prevented earlier application", the Trustees properly saw no justification for an extraordinary delay of six years in making such an application.

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[7] The cancellation of the petitioner's pension credits pursuant to the break in employment provision also rendered the petitioner ineligible for a Disability Pension. He did not meet the requirements for "total and permanent disability" in Article II, Section 10 of the Pension Plan, as he earned more than $1200 in the calendar years of 1973, 1974, 1975 and 1976. Nor did the petitioner apply for and receive Social Security disability benefits during the period that he was allegedly disabled.

The Court of Appeals, likewise, properly rejected the petitioner's argument that the November, 1978 letter did not trigger the statute of limitations, as that denial violated the notice requirements of ERISA Section 503(1), 29 U.S.C. Section 1133(1). The Court of Appeals correctly concluded that the November, 1978 letter provided the petitioner with adequate notice setting forth the specific reasons for the denial of his application for pension benefits, so as to satisfy the requirements of ERISA Section 503(1)[8] (A-10-11). According to the petitioner, the major defect in the November, 1978 letter was the Trustees' failure to apprise him that he was entitled to a "grace period" due to his alleged disability. For the reasons discussed previously above, the "grace period" provisions of Article III, Section 5(C) of the Pension Plan are totally inapplicable to the petitioner under the circumstances at bar.[9]

Significantly, the November, 1978 letter clearly informed the petitioner that he had incurred a break in employment, resulting in the cancellation of his previously earned pension credits. As the Plan Administrator stated in the November, 1978 letter and as the attorney for the Pension Fund reiterated in December, 1986, the petitioner's lengthy break in service rendered him ineligible for all categories of pensions available under the applicable Pension Plan. The letter of November, 1978 enclosed a copy of the Pension Plan and apprised the petitioner of his

[8] A footnote in the certiorari petition refers to the petitioner's argument that the November, 1978 letter violated the notice requirements of Section 503(1) of ERISA and the Department of Labor regulations implementing that statutory provision (P-6-7). Page references preceded by "P" refer to the petition for certiorari.

[9] Assuming *arguendo* that the Court of Appeals had concluded that the November, 1978 letter violated the notice requirements of Section 503(1) of ERISA, this would not prevent said letter from triggering the statute of limitations on the petitioner's claim for benefits. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed. 2d 588 (1986). The Courts have held that violations of ERISA's procedural requirements do not generally entitle an applicant to substantive relief, for example an award of pension benefits to which he would not otherwise be entitled. *See Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir 1985); *Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983).

right to appeal the denial of his application. The petitioner never pursued the Pension Fund's internal appeal procedure. Accordingly, the Pension Fund's denial of the petitioner's application for pension benefits in November, 1978 became final, for the purposes of the statute of limitations, when he failed to appeal that determination within the applicable time limits. *See Morgan v. Laborers Pension Trust Fund*, 433 F.Supp at 525.

The respondents raised the issue that the petitioner's ERISA claims were time-barred under the applicable statutes of limitations in the answer and in their memoranda of law submitted to the District Court in support of their motion for summary judgment. The ERISA statute of limitations issue was also mentioned in the respondents' brief submitted to the Court of Appeals. As was discussed above, the District Court and the Court of Appeals concluded that the petitioner's claims under the Taft-Hartley Act accrued in November, 1978, for the purposes of the statute of limitations. This conclusion applies with equal force to the petitioner's ERISA claims. Accordingly, if the petitioner had raised the issue of the timeliness of his ERISA claims in his petition for certiorari, this issue would have been appropriate for review by this Court. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98, 104 S.Ct. 2694, 2699, 81 L.Ed.2d 580, 587-88 (1984); *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 768 n. 17, 101 S.Ct. 1451, 1460, n.17, 67 L.Ed.2d 662, 663-64 n.17 (1981). Inasmuch as the petitioner has failed to request this Court to review the timeliness of his ERISA claims in his petition for certiorari, the findings of fact and conclusions of law by the District Court and the Court of Appeals relevant to this crucial dispositive issue would not be affected by this Court's determination on the sole issue presented in the certiorari petition. *See Helms v. Hewitt*, 712 F.2d 48, 49 (3rd Cir. 1983).

B. The Petitioner is Ineligible for Benefits Under the Terms of the Applicable Pension Plan.

The District Court and the Court of Appeals both concluded that the petitioner was ineligible for benefits under the terms of

the applicable pre-ERISA Pension Plan (A-9, 30-31). Once again, the petitioner has failed to raise this dispositive issue in his petition for certiorari and, thus, the findings and conclusions of the Court of Appeals on said issue would stand unaffected by this Court's determination of the issue presented for review. *See Helms v. Hewitt*, 712 F.2d at 49.

The petitioner has failed to effectively challenge the conclusion of the Court of Appeals that he is ineligible under the terms of the Pension Plan, as his accrued pension credits were cancelled when he incurred a break in service upon his permanent withdrawal from covered employment. Accordingly, even assuming *arguendo* that this Court accepts this case for review and determines that the fiduciary provisions of ERISA are, indeed, applicable, a remand to the District Court for a determination as to whether the Trustees breached their fiduciary duties by denying the petitioner's application for pension benefits would be a waste of scarce judicial resources.

ERISA Section 203(b)(1)(F) explicitly permits the exclusion of any credit for years of service prior to the effective date of ERISA which could be excluded " . . . under the rules of the plan with regard to breaks in service, as in effect on the applicable date . . . " 29 U.S.C. Section 1053(b)(1)(F). Courts have repeatedly upheld the determinations by pension fund trustees that individuals forfeited their accumulated pension credits by the operation of pre-ERISA break in employment provisions, similar to Article III, Section 5 of the Pension Plan at bar. *See, e.g., Haeberle v. Board of Trustees of Buffalo Carpenters Health Care, Dental, Pension and Supplemental Funds*, 624 F.2d 1132 (2nd Cir. 1980); *Poggi v. New York Shipping Association-International Longshoremen's Association Pension Trust Fund*, 624 F.Supp. 983 (S.D.N.Y. 1985).

The petitioner relies upon a tortured, illogical manipulation of the break in employment and "grace period" provisions of the Pension Plan to bridge a period of over three years after he left covered employment permanently in September, 1971 before he attained the minimum retirement age of 55 for an Early Retirement Pension in January, 1975 (P-4 (footnote)). There can be no question that the Trustees' determination in November,

1978 denying the petitioner's application for pension benefits, based upon the break in employment provision in Article III, Section 5 of the Pension Plan, passes muster pursuant to the standards of review applicable to fiduciaries under ERISA. In *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___ , 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), this Court articulated the standards of judicial review for benefit determinations by fiduciaries or plan administrators in actions under ERISA Section 502(a) (1)(B). In determining the appropriate standards of review, this Court was guided by the principles of trust law, which are reflected in the provisions of ERISA. This Court concluded, "Consistent with established principles of trust law, we hold that a denial of benefits challenged under Section 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. at ___ , at 109 S.Ct. at 956, 103 L.Ed.2d at 95.

The Trustees' denial of the petitioner's application, however, will easily survive judicial scrutiny regardless of whether a *de novo* review is undertaken or a more deferential standard of review is utilized. The petitioner's permanent withdrawal from covered employment in September, 1971, several years prior to his attaining the minimum retirement age of 55 for an Early Retirement Pension,[10] rendered him ineligible for benefits under the terms of the Pension Plan. Numerous decisions have upheld determinations by pension plan fiduciaries and administrators declining to allow employees, like the petitioner, who left covered employment prior to attaining the minimum

[10] As was stated earlier, the petitioner's earnings from non-covered employment in the calendar years 1973-1976, after he left covered employment, rendered him ineligible for a Disability Pension under the terms of the plan. The petitioner's permanent withdrawal from covered employment prior to attaining age 55 would, likewise, render him ineligible for a Reduced Pension, for which he purportedly applied in 1986. In order to qualify for a Reduced Pension, an employee must retire after he has attained age 65. Article II, Section 13 of the Pension Plan defines retirement as " . . . complete withdrawal from any work in Covered Employment."

retirement age, additional time to "bridge" their years of service and render them eligible for early retirement benefits. *See Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Gent v. Allied-Signal, Inc.*, No. 87-C-397-B (N.D. Okla. Dec. 9, 1987). *See also Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779 (9th Cir. 1988).

There is no language in Article III, Section 5 of the Pension Plan which allows the Trustees to grant an employee, who permanently withdraws from covered employment prior to attaining the minimum retirement age for pension benefits, several additional years to qualify for benefits, as the petitioner is advocating. The break in employment and "grace period" provisions of Article III, Section 5 allow an employee to avoid the cancellation of previously earned pension credits by returning to work in covered employment within a certain period of time. The petitioner, however, could not take advantage of either of the above two provisions, as it is undisputed that he never returned to covered employment after September, 1971. The Trustees' determination denying the petitioner's application for pension benefits was in accordance with the terms of the Pension Plan. Section 404(a)(1)(D) of ERISA requires a fiduciary to discharge his duties " . . . in accordance with the documents and instruments governing the plan . . . ". Adherence to the terms of the applicable Pension Plan, thus, is not a breach of fiduciary duty. *See Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989); *Hickman v. Tosco Corp.*, 840 F.2d at 566. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12, 101 S.Ct. 1895, 1900, 68 L.Ed.2d 402, 409-10 (1981), this Court emphasized that ERISA accords to private parties, like the Trustees at bar, the discretion to determine the method of calculating benefits and the amount of benefits. Accordingly, the federal courts cannot accept the petitioner's entreaties to rewrite the break in service provision in the Pension Plan in order to render him eligible for benefits.

The "grace period" provision of Article III, Section 5(c) of the Pension Plan, which allows an employee found to be totally disabled additional time to return to covered employ-

ment in order to avoid the cancellation of his accrued pension credits, is entirely a matter of discretion for the Trustees. There is no precedent or justification for the Trustees to grant the petitioner a "grace period" over eight years after his November, 1978 application for pension benefits and approximately fifteen years after he withdrew permanently from covered employment. As has been previously stated, the petitioner is clearly ineligible for the "grace period" under the terms of the Pension Plan, as he never returned to covered employment and his earnings as a machinist in non-covered employment prevented him from qualifying as totally and permanently disabled, within the meaning of Article II, Section 10 of the Pension Plan.[11]

In view of the petitioner's clear ineligibility for benefits under the terms of the Pension Plan, remanding this case to the District Court for a further review of the Trustees' denial of his application, if this Court determines that the fiduciary standards of ERISA are applicable, would be a "useless formality". *Ellenburg v. Brockway, Inc.*, 763 F.2d at 1096. Accordingly, this case is not appropriate for review and this Court should decline to grant the petition for certiorari.

POINT III

The Court of Appeals correctly construed and applied the exception to the preemption provision in Section 514(b)(1) of ERISA under the facts and circumstances at bar; the construction advocated by the petitioner would not alter the substantive result.

The sole issue presented for review by this Court in the petition for certiorari involves the construction of the exception to the preemption of state law by ERISA in Section 514(b)(1) of ERISA, 29 U.S.C. Section 1144(b)(1). This section provides that ERISA's preemption of state law " . . . shall not apply with

[11] The lapse of time since the petitioner's withdrawal from covered employment in 1971 will render it difficult, if not impossible, for the Trustees to obtain complete records and witnesses to verify his conclusory assertions that he was disabled at that time.

respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. Section 1144(b)(1).

The Court of Appeals affirmed the dismissal of the petitioner's claims under the fiduciary standards provisions of ERISA for lack of federal subject matter jurisdiction pursuant to Section 514(b)(1) of ERISA. The Court of Appeals concluded that the relevant "act", for the purposes of ERISA Section 514(b)(1), was the Pension Fund's adoption of the break in employment policy prior to the January 1, 1975 effective date of fiduciary standards provisions of ERISA (A-6). Citing with approval the decision of *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), the Court of Appeals stated, "Here, as in *Menhorn*, the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy." *Lamontagne v. Pension Plan of the United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156. (A-7).

The petitioner advocates an alternative construction of Section 514(b)(1), whereby ERISA's fiduciary standards provisions would apply to all denials of pension benefits occurring on or after January 1, 1975. regardless of whether the denial was based upon the provisions of a pre-ERISA plan, as was the case at bar. The petition states that decisions from the Courts of Appeals for several circuits have concluded that the phrase "act or omission" in Section 514(b)(1) refers to the determination denying an application for pension benefits, while other circuits, including the Second Circuit in the instant case, have held that this phrase refers to critical acts or omissions upon which the denial was based.

Respondents respectfully submit that the issue framed by the petitioner is not appropriate for review by this Court, for several reasons. Firstly, the Court of Appeals correctly construed and applied Section 514(b)(1) of ERISA under the facts and circumstances at bar. Secondly, there are fundamental flaws in the case law and the reasoning supporting the petitioner's proposed alternative construction of Section 514(b)(1). Lastly,

even assuming *arguendo* that this Court adopts the petitioner's proposed construction, this would not alter the substantive result, as he is clearly ineligible for benefits under the terms of the applicable Pension Plan.

A. The Court of Appeals Correctly Construed and Applied Section 514(b)(1) of ERISA.

The construction of Section 514(b)(1) employed by the Court of Appeals at bar has the practical impact of preventing " . . . past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent 'cause of action.'" *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981). *See also Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d at 1500. Other provisions of ERISA evince the intent of Congress to apply the provisions of that statute prospectively only. For example, the minimum vesting standards in Section 203 of ERISA explicitly give effect to break in service provisions in pre-ERISA pension plans, like Article III, Section 5 of the plan at bar, by allowing fiduciaries and administrators to disregard " . . . years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date . . . ". ERISA Section 203(b)(1)(F), 29 U.S.C. Section 1053(b)(1)(F). *See Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 145 (3rd Cir. 1985).

In the instant case, there can be no question that the petitioner's ineligibility for pension benefits is the inexorable consequence of the break in service rule in Article III, Section 5(b) of the Pension Plan, which resulted in the cancellation of his accrued pension credits when he withdrew permanently from covered employment. The cancellation of pension credits when a break in service occurs is essentially self-executing. The "grace period" provision of Article III, Section 5(c) was not raised when the petitioner applied for pension benefits in 1978.

For the reasons discussed extensively in Point II, *supra*, the "grace period" provision is clearly inapplicable under the circumstances at bar, as the petitioner never returned to covered employment and his earnings after leaving such employment prevented him from qualifying as disabled under the terms of the Pension Plan.

B. The Case Law and Reasoning Supporting the Petitioner's Assertion that ERISA's Fiduciary Standards Apply to all Post-1975 Denials of Benefits are Flawed.

The petitioner cites decisions from the Third, Fourth and Fifth Circuits,[12] as well as the arguments in the brief submitted by the Department of Labor to the Eighth Circuit in *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), in support of his proposed construction of Section 514(b)(1) of ERISA. According to the petitioner's reading of Section 514(b)(1), the fiduciary standards of ERISA apply to all denials of pension benefits occurring after January 1, 1975. The reasoning in several of the authorities cited by the petitioner, however, is flawed.

In *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 971, the Court of Appeals for the Fifth Circuit concluded that a construction of the term "act or omission" in Section 514(b)(1) of ERISA, creating an exception from the preemption of state law where a post-ERISA denial of benefits is based upon a pre-ERISA pension plan or other significant conduct, would, in effect, render the first exception, for "any cause of action which arose" prior to ERISA's effective date, superfluous. The Court of Appeals observed, " . . . (t)he cause-of-action exception would have independent significance only if it applies in contexts to which the act-or-omission exception is inapplicable." *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 971. Accordingly, the Fifth Circuit construed the term "act or omission" to refer to " . . . pension-related state

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[12] *See Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir. 1989); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989); *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3rd Cir. 1985); *Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d 966 (5th Cir. 1981).

administrative proceedings and criminal prosecutions, which certainly cannot be characterized as causes of action." *Woodfork*, 642 F.2d at 971. No other circuit has endorsed this construction of Section 514(b)(1) of ERISA.

The construction of ERISA Section 514(b)(1) in *Woodfork*, however, nullifies the "act or omission" exception. Under this construction, ERISA's fiduciary standards preempt state law unless the denial or benefits occurred prior to January 1, 1975. If the denial occurred after 1975, ERISA's fiduciary provisions would apply, despite the fact that the denial was based upon the unambiguous provisions of a pre-ERISA pension plan, like the break in service provision at bar. In effect, the accrual of the clause of action and the "act or omission" would both occur on the date the pension application was denied.

If, as the *Woodfork* decision posits, a statute should not be construed in such a way to render certain provisions superfluous (*See Woodfork v. Marine Cooks and Stewards Union*, 642 F.2d at 970-71), the only construction which gives full effect to the "act or omission" exception in Section 514(b)(1) of ERISA is that employed by the Second Circuit in the instant case, which is in accord with decisions from the First, Seventh, Eighth and Ninth Circuits.[13] Under this construction, the fiduciary standards provisions of ERISA would not apply to denials of benefits occurring after January 1, 1975, which were based upon the clear, unambiguous provisions of a pre-ERISA pension plan, like the break in service provision in Article III, Section 5 of the Pension Plan at bar. *See Lamontagne v. United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156; *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501-

[13] *See Smith v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587 (9th Cir. 1988); *Lee v. Garrett Corp. Retirement Plan*, 803 F.2d 1082 (9th Cir. 1986); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070, 103 S. Ct. 1526, 75 L.Ed.2d 948 (1983); *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978).

1502; *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 894-95. This view is consistent with the Congressional intent to apply the standards for employee benefit plans set forth in ERISA prospectively only and to give effect to break in service provisions in pension plans adopted prior to ERISA's effective date. See ERISA Section 203(b)(1)(F), 29 U.S.C. Section 1053(b)(1)(F); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501; *Quinn v. Country Club Soda Co.*, 639 F.2d at 841.

In support of his proposed construction of Section 514(b)(1) of ERISA, the petitioner places significant emphasis on the views of the United States Department of Labor in its brief submitted to the Eighth Circuit in *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (See P-21-30). In this brief, the Department of Labor concluded that the applicability of ERISA's fiduciary standards depends upon the date of benefit denial, by reasoning that Congress intended the phrase "act or omission" to apply only to the conduct of fiduciaries and not to the conduct of participants and beneficiaries (P-21). This construction of Section 514(b)(1) does not compel a different result at bar. The Pension Fund's adoption of the applicable pre-ERISA Pension Plan, which the Court of Appeals held was the relevant act for the purposes of Section 514(b)(1), unquestionably constitutes conduct of fiduciaries to which the phrase "act or omission" applies, according to the Department of Labor brief. *See Lamontagne v. Pension Plan of the United Wire, Metal and Machine Pension Fund*, 869 F.2d at 156 (A-6-7); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d at 895.

C. The Petitioner's Proposed Construction of Section 514 (b)(1) Does Not Alter the Substantive Result, as He is Ineligible for Benefits Under the Terms of the Pension Plan.

If this Court adopts the construction of Section 514(b)(1) proposed by the petitioner, this will not alter the substantive result at bar. The petitioner is clearly ineligible under the terms of the applicable Pension Plan. See Point II, *supra*. This Court recently reaffirmed the principle that federal courts reviewing determinations on applications for benefits by fiduciaries " . . .

are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S., at 56." *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. at ___, 109 S.Ct. at 954, 103 L.Ed. 2d at 92. It is axiomatic, however, that fiduciaries, like the Trustees at bar, must adhere to the terms of the applicable pension plan. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d at 1077-78.

In *Tanzillo v. Local 617, International Brotherhood of Teamsters*, 769 F.2d 140, one of the decisions cited by the petitioner in support of his proposed construction of Section 514(b)(1) of ERISA, the Third Circuit gave effect to a break in service provision in a pre-ERISA pension plan similar to Article III, Section 5 of the plan at bar. The Court of Appeals affirmed the order granting summary judgment in favor of the pension fund, where a pre-ERISA break in service rule applied to cancel some of the accrued pension credits the participant needed in order to qualify for benefits. *Cf. Degan v. Ford Motor Co.*, 869 F.2d 889 (Court of Appeals for the Fifth Circuit affirmed the order granting summary judgment and dismissing the complaint of a former employee claiming a right to early retirement benefits, based upon the pre-ERISA oral representations by his employer and union regarding the effect of drawing separation pay after his plant closed).

In view of the petitioner's ineligibility for benefits under the terms of the Pension Plan, review by this Court of the issue raised in the petition for certiorari will not alter the substantive result reached by the Court of Appeals, the dismissal of the petitioner's complaint.

CONCLUSION

For the above reasons, this Court should decline to grant the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

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August 4, 1989

Respectfully submitted,

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